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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Application of

RICHARD A. BURTON  
Harbor City, CA

For Amateur Station  
and Operator Licenses

PR Docket No. 92-144

To: Administrative Law Judge Edward J. Kuhlmann

RESPONSE TO MOTION FOR SUMMARY DECISION

Applicant RICHARD A. BURTON, by his attorney Kenneth I. Kahn, hereby responds to the Motion for Summary Decision ("MSD") of the Private Radio Bureau ("PRB") as follows:

1. The F.C.C. Act (47 U.S.C.) §309(e) provides that a hearing shall be set regarding any application where:

"a substantial and material question of fact is presented or the Commission for any reason is unable to make the findings

specified."

The Commission issued a Hearing Designation Order in this case on July 9, 1992 (attached hereto as Exhibit A), setting forth the material issues of fact designated by the Commission to be determined by a full presentation of evidence in a hearing. This Hearing Designation Order enumerated all of the convictions set forth in the PRB's Motion for Summary Decision, and then went on to state that this was one of the issues which the Commission required a hearing to resolve:

"(a) To determine whether, in light of the license revocation/suspension and the convictions described above, RICHARD A. BURTON is qualified to become a Commission licensee."

Yet these very same issues are presented to this Court as the sole basis for the PRB's Motion for Summary Decision. The Commission has already designated Mr. BURTON's convictions and suspension/revocation as a material issue of fact which needs to be resolved in a full hearing; these matters cannot, at the same time, be dispositive of Mr. BURTON's "requisite character qualifications" (MSD, paragraph 4) without Mr. BURTON's having been afforded a hearing to present evidence for the Commission's consideration.

2. The second issue to be resolved in Mr. BURTON's hearing was:

"(b) To determine, in light of the foregoing issue [convictions, etc] whether RICHARD A. BURTON's application

would serve the public interest, convenience and necessity." The PRB's Motion for Summary Decision simply ignores this issue, blithely assuming again that the existence of the referenced convictions is sufficient to dispose of this matter. Again, the Commission set this matter for a hearing pursuant to §309(e) because a decision could not be made without a full airing of the facts and issues regarding these convictions. The hearing was set with full knowledge of Mr. BURTON's convictions, which were not then considered dispositive of the issue. There is no reason that the mere inclusion of a recitation of these convictions in the PRB's Motion for Summary Decision would now magically transform these material issues of fact, for which a hearing was necessary into incontrovertible facts which can summarily dispose of this matter. These issues regarding character qualifications deserve a full hearing wherein the discretion of the Commission can evaluate the issues (as more fully set forth hereinafter). The basis for setting the hearing was that these issues exist; the PRB cannot now use their existence to deny Applicant that hearing.

3. In the F.C.C. Report, Order and Policy Statement Regarding Character Qualifications in Broadcast Licensing, 1022 F.C.C.2d 1179, adopted December 10, 1985 and released January 14, 1986, the Commission found:

"The finding of facts regarding qualifications is not, however, an end in itself. Rather it is a step in the process of evaluation by which the Commission determines whether the public interest would be served by grant of the application

before it." At 1180, paragraph 2.

The Commission was well aware of Mr. BURTON's convictions at the time it set a hearing to evaluate fully any evidence surrounding such convictions. As stated by the Commission, the fact that these convictions exist is only "a step in the process of the evaluation" of these facts by the Commission. To preclude a full evaluation of all relevant factors regarding these convictions by the Commission, as urged by the PRB's Motion for Summary Decision, would be directly contrary to the Commission's stated policy. Later in this report, the Commission cites with approval two landmark Federal cases which affirm the Commission's discretion regarding the nature of the inquiries to be conducted as part of the licensing process, particularly in regard to character qualifications. (National Association of Regulatory Utility Commissioners vs. F.C.C. (D.C. Cir 1976) 525 F.2d 630, 645, cert. den. 425 U.S. 992; Black Citizens for a Fair Media vs. F.C.C. (D.C. Cir 1983) 719 F.2d 407, cert den 104 S. Ct. 3545. Referring to these cases in the F.C.C. Report on Character Qualifications, the Commission held that the statutory list of subjects regarding character qualifications is

"neither exhaustive nor mandatory. The statutory sections do not of themselves require that the Commission make any inquiry into the character qualifications of broadcast applicants."

The PRB's Motion for Summary Decision asks this Court to by-pass the remainder of the F.C.C.'s discretionary evaluation process by citing the very issues that gave rise to the setting of the hearing herein. To do so would be unjust and outside the F.C.C.'s

regulatory processes for evaluating applicants for broadcast licenses.

4. Case law has long affirmed the broad discretion vested in the Commission regarding which, if any, factors to evaluate in deciding whether to grant a broadcast application, and what weight to give such factors: F.C.C. vs. WNCN Listeners Guild (1981) 450 U.S. 581, 593, 594; F.C.C. vs. Wako, Inc. (1946) 329 U.S. 211, 226, 228, 229; F.C.C. vs. Pottsville Broadcasting Co. (1940) 309 U.S. 134, 145, 146; Pinellas Broadcasting Co. vs. F.C.C. (1956) 230 F.2d 204, 206, 208; National Association of Regulatory Utilities Commissioners vs. F.C.C., *supra*, at 645; and Stereo Broadcasters, Inc. vs. F.C.C. (1981) 652 F.2d 1026, 1031. If the PRB's Motion for Summary Decision is granted, this would deprive the Commission of its exercise of discretion in evaluating all of the factors regarding Mr. BURTON's qualifications to become a broadcast licensee, a process that the Commission obviously intended to go through when it set the hearing in this matter.

5. The PRB's Motion for Summary Decision proceeds on the assumption that the existence of F.C.C.-related violations is, in and of itself, dispositive of the issue of character qualification. This is not the case; In the Matter of Albert H. Gould (1979) 75 F.C.C.2d 193, Mr. Gould had a history of violations regarding the use of his C.B. Radio. However after a full hearing in the matter during which Mr. Gould presented witnesses and documentary evidence on his behalf, it was found that these violations in and of themselves were insufficient to deny Mr. Gould the desired

broadcast license. Therefore, based on the findings in Gould, the PRB's assertion that Mr. BURTON's F.C.C.-related violations are so overwhelming that any further presentation of evidence would not weigh the scales in favor of granting a license to Mr. BURTON is completely erroneous; therefore, the Motion for Summary Decision based on this premise should properly be denied.

6. The mere fact that the Commission set Mr. BURTON's application for a full hearing on the issue of his F.C.C.-related violations is sufficient to indicate a material issue of fact which requires full presentation of evidence related to these violations. The wide discretion invested in the F.C.C. cannot support a finding that the existence of F.C.C.-related violations is, in and of itself and without further evaluation, sufficient upon which to deny an application for a broadcast license. The case law regarding F.C.C. discretion in decided the basis upon which to issue or deny broadcast license applications has as its cornerstone the Commission's vested right to decide what if any facts before it to consider and what if any weight to give to each of these facts. Such wide-based discretion cannot support the granting of the PRB's Motion for Summary Decision, which would deprive the Commission of the opportunity to exercise such discretion. In the case quoted by the PRB in its Motion for Summary Decision, TeleSTAR Inc. (1988) 3 F.C.C. Rcd 2860, the Commission stated: "We do not lightly deny any application." (at 2860) To grant the PRB's Motion for Summary Judgment would be to lightly deny Mr. BURTON's application for broadcast license. Statutory and case law and the regulatory

scheme by which the F.C.C. grants and denies broadcast licenses all

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mandate that all full hearing be granted to Mr. BURTON in which the Commission may exercise its vested discretion to evaluate all the factors regarding Mr. BURTON's application.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kenneth Kahn', is written over a horizontal line.

KENNETH KAHN  
Attorney for Applicant  
RICHARD A. BURTON

Dated: August 28, 1992

Before the  
Federal Communications Commission  
Washington, D.C. 20554

PR Docket No. 92-144

In The Matter of the  
Application of

RICHARD A. BURTON  
Harbor City, California

For Amateur Station  
and Operator Licenses

#### HEARING DESIGNATION ORDER

Adopted: June 29, 1992;

Released: July 9, 1992

1. Mr. Richard A. Burton has applied for Amateur Radio Service station and operator licenses. For the reasons stated below, his application will be designated for a hearing to determine whether the application shall be granted.

2. On September 11, 1981, the Commission revoked Burton's license for amateur station WB6JAC and affirmed the suspension of his General Class amateur operator license. These actions were based on Burton's willful and repeated violations of the Commission's Rules.

3. In *United States of America v. Richard A. Burton*, No. CR 82-378-R (C.D. Calif. June 28, 1982), Burton was convicted in the U.S. District Court for Central District of California (District Court) on four counts of transmitting without a license, in violation of Section 318 of the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. § 318,<sup>1</sup> and on two counts of transmitting obscene, indecent or profane words, language or meaning, in violation of 18 U.S.C. § 1464.<sup>2</sup> The District Court sentenced Burton to eight years of imprisonment, of which six months were to be served in a jail-type institution and the remainder suspended. Burton was also placed on probation for five years and required to devote 1,500 hours to a charitable organization approved by his probation officer.

4. Upon appeal, the U.S. Court of Appeals for the Ninth Circuit (Court of Appeals) affirmed Burton's conviction of having violating 47 U.S.C. § 318, and reversed his conviction concerning 18 U.S.C. § 1464. *United States of America v. Richard A. Burton*, No. 82-1391 (9th Cir. October 25, 1983). On January 16, 1984, the District Court resentenced Burton. On or about October 1, 1984, the Court of Appeals ruled that the January 16, 1984,

resentencing was invalid. On December 17, 1984, the District Court again resentenced Burton. Burton was sentenced to four concurrent one year terms of imprisonment, of which six months was to be served in a jail-type institution and the remainder suspended. Burton was also placed on probation for five years. On December 31, 1984, Burton violated the terms of his probation by operating radio apparatus without a license. As a result, his sentence was modified on May 1, 1985, to include therapy during the period of his probation.

5. On March 17, 1990, Burton again transmitted without a license. In *United States of America v. Richard A. Burton*, No. CR-90-357-RMT (C.D. Calif. October 1, 1990), Burton was again convicted of having violated 18 U.S.C. § 318. Burton was sentenced to one year of probation and a fine of \$2,000.

6. In view of the amateur license revocation/suspension and the criminal convictions described above, it appears that Burton may lack the requisite convictions for unlicensed operation are relevant to evaluating the likelihood that he will comply with the Commission's Rules as a licensee in the amateur service. See *Character Qualifications*, 5 FCC Rcd 3252 (1990); *TeleSTAR, Inc.*, 3 FCC Rcd 2860, 2866 (1988); *Character Qualifications*, 102 FCC 2d 1179, 1183, *recon. denied*, 1 FCC Rcd 421, 424 (1986).

7. Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), requires the Commission to designate an application for hearing if it is unable to find that granting the application would serve the public interest, convenience and necessity. Accordingly, the application of Richard A. Burton for amateur station and operator licenses is hereby DESIGNATED FOR HEARING pursuant to Section 309(e) of the Communications Act. If Burton desires to present evidence at a hearing, he must file a notice of appearance within 20 days from the release of this order. A time, place, and Presiding Judge will be designated, if necessary, by later order. If Burton does not file a timely notice appearance, his application will be subject to dismissal under Section 1.961(b) of the Commission's Rules, 47 C.F.R. § 1.961(b).

8. Based upon the above information, this case will be decided upon the following issues:

(a) To determine whether, in light of the license revocation/suspension and the convictions described above, Richard A. Burton is qualified to become a Commission licensee.

(b) To determine, in light of the foregoing issue, whether granting Richard A. Burton's application would serve the public interest, convenience and necessity.

#### FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara  
Chief, Special Services Division

<sup>1</sup> 47 U.S.C. § 318 provides, in pertinent part: "The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's li-

cense issued to him by the Commission...."

<sup>2</sup> 18 U.S.C. § 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both."



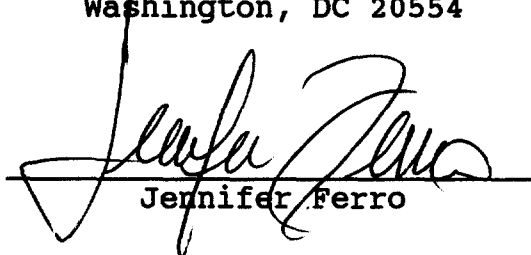
Certificate of Service

I, Jennifer Ferro, certify that on August 28, 1992 a copy of the foregoing Response to Motion for Summary Decision, filed on behalf of Applicant RICHARD A. BURTON, was sent by First Class Mail to:

Eric Malinen, Esq  
Marc Martin, Esq  
Private Radio Bureau  
F.C.C.  
2025 M St. NW  
Washington, DC 20554

and six copies to:

Donna Searcy, Secretary of the Commission  
F.C.C.  
1919 M St NW  
Washington, DC 20554

  
Jennifer Ferro